

*Separation
of Powers
Release of Information*

Mr. Ed Strait

September 23, 1954

J. F. C. Hyde, Jr.

Pursuant to our telephone conversation and at your request, I am returning the attached file.

As I told you, it seemed to me that it might be wise to discuss our proposed reply with Justice before we sent it. Accordingly, I called them and was put in touch with Mr. Herschel Plaine (ext. 50), who drafted the August 20th letter to us. He was in general agreement with our proposed reply.

Mr. Plaine, however, did express the view that Justice thought it very difficult to distinguish between executive and legislative commissions and that, in any event, they saw no need to make such a distinction here. They felt that any commission created by act of Congress could cause a separation of powers problem with respect to obtaining information from Executive agencies.

There is one other point I would like to raise. Would it not be desirable to have the phrase "to the extent permitted by law" read "to the extent otherwise permitted by law" to avoid the argument that the law in which the phrase itself is contained permits the furnishing of the information?

AUG 20 1954

Honorable Rowland A. Hughes
Director
Bureau of the Budget
Washington, D. C.

Dear Mr. Hughes:

The recent adoption of Public Law 558, 83d Congress, approved July 29, 1954, has called attention again to a problem in legislative drafting that is a source of difficulty in congressional-executive branch relationships. Public Law 558 creates the Commission on Governmental Use of International Telecommunications, consisting of nine members, five of whom are appointed by the President and two each by the President of the Senate and Speaker of the House from their respective Houses of Congress. The Commission is charged with reporting to the Congress its findings and recommendations with respect to the effectiveness of the information programs of the Government in the area of foreign policy through the use of foreign telecommunications. Section 10(e) of the statute reads as follows:

"The Commission is authorized to secure from any department, agency, or independent instrumentality of the Government any information it deems necessary to carry out its functions under this Act; and each such department, agency, and instrumentality is authorized and directed to furnish such information to the Commission, upon request made by the Chairman or by the Vice Chairman when acting as Chairman."

In this respect the statute appears to follow the language used in establishing the Commission on Organization of the Executive Branch of the Government, popularly known as the Hoover Commission (see section 10(b) of Public Law 106, 83d Congress, approved July 10, 1953) and possibly some other statutes enacted by the current Congress.

On its face, with the use of such peremptory language, a provision of this character makes no allowance for the constitutional prerogative of the executive branch to place limitations upon the delivery up or disclosure of executive branch papers and files which, because of their nature or contents, must remain confidential in the public interest, and to determine which information is confidential. Absent some

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recognition of this limitation, the unqualified conferral of authority upon new agencies and investigatory bodies to make demands for documents, and the absolute direction to comply, is fraught with the possibility of disputes between the congressional and executive branches.

Hence to the extent possible this Department in the past, when afforded advance opportunity for comment on such proposals, has sought an avoidance of clash between the two branches of Government, or agencies of each, by suggesting language in the information provisions of proposed statutes which would recognize the limitations upon the obtaining and supplying of information. For example, prior to its enactment the bill to establish a Commission on Foreign Economic Policy, S. J. Res. 78, 83d Congress, made identical provision for the obtaining of data that is contained in section 10(e) of Public Law 558, quoted above. In my letter of May 5, 1953, to your predecessor, the conflict was pointed out and language was suggested which would authorize the Commission on Foreign Economic Policy "to request" any department of the executive branch for necessary information, and would authorize such department "to the extent permitted by law" to furnish the Commission with such information. The suggestion of the executive branch, along these lines, apparently prevailed in that legislation. The Commission on Foreign Economic Policy was set up under Title III of the Trade Agreements Extension Act of 1953, Public Law 215, 83d Congress, approved August 7, 1953. While the exact words suggested by this Department were not used, the similar tenor of them is contained in section 10(b), which reads as follows:

"Obtaining Official Data.--The Commission is authorized to request from any department, agency, or independent instrumentality of the Government any information it deems necessary to carry out its functions under this title; and each such department, agency, and instrumentality is authorized to furnish such information to the Commission, upon request made by the Chairman or by the Vice Chairman when acting as Chairman."

In our view this is much more desirable language than the kind used in Public Law 558, supra. It provides the necessary accommodation of the needs and requirements of the legislative and executive branches. Of course, the principle which permits the President and the heads of the executive branch departments to keep confidential, in the public interest, papers and information which require secrecy, is rooted in the constitutional separation of powers. See statement of the Government's

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position in United States v. Reynolds, 345 U.S. 1, 6 (1953); and Memorandum of the Attorney General to the President, dated May 17, 1954, accompanying the letter of even date from the President to the Secretary of Defense, 100 Cong. Record 6263. It would therefore be our view that despite the difference of language between the information provisions of such statutes as Public Law 558 and Public Law 215, the force of the former is no greater than the latter, and both are subject to the same constitutional limitations.

However, the occasions for conflict between the legislative and executive branches are considerable and distressing enough without adding to them by further provocative legislation. We think it would be in the interest of harmony to devise a form of standard language for such information provisions, particularly to be used when legislation is prepared in the executive branch, and for suggested use on any occasion when legislative proposals with information provisions confront the executive branch for comment or approval. In any such model, we would like to see the authorization of the Government agencies to furnish the information prefaced with the phrase "to the extent permitted by law." However, if the language of section 310(b) of the Trade Agreements Extension Act of 1953 is obtained as a usual information provision, it would certainly approximate the type of desirable recognition that is needed in these cases.

Sincerely,

William P. Rogers
Deputy Attorney General

ROUTE SLIP

(Fold Here)

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET

DATE 9/23/54

TO: Mr. W. Pforzheimer, CIA

FROM: J. F. C. Hyde, Jr.

REMARKS:

*Jim: - This seems
OK, particularly in
the light of the last
paragraph of your
memo of 23 Sept.*

(Sd)

9/28/54

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